In my attempt to probe into the real nature of the appellant's objection, I came across the following words which appear in paragraph 2(d) and (e) of the memorandum of appeal:

"(d) he failed to consider that the crux of the question before him turned on the use of the word 'under' in the definition of the words 'statutory authority' which word in the context used in the definition has a clear and definite meaning.

(e) he interpreted the said definition as if the word 'by' had been used therein instead of 'under'."

From counsel's argument before us at the hearing of this appeal, it was well nigh impossible to know exactly what clear and definite meaning the word "under" has. By itself the word conveys nothing of legal import. It must be read in its proper context. I would understand counsel to mean that this word coming after the words of the definition "established, appointed or constituted" has the same meaning as the word "under" which usually follows the expression "incorporated" when used in reference to a company or companies registered pursuant to the requirements of the Companies Act. Why it should have that same meaning was not clearly stated. Some reliance was placed on a meaning given to the word "incorporate" in the *Shorter Oxford* Dictionary, 3rd Edition, which upon examination does not help the appellant in any way. If I may echo the words of Grove J. in *Wakefield Local Board* v. *Lee*: [13]

"Except in mathematics, it is difficult to frame exhaustive definitions of words;"

Even more clearly was it stated by Abbott C.J. in *The King* v. *Hall*[14] thus:

"Now, the meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be attained."

I do not think it would serve any useful purpose for me to elaborate in this way for it is quite clear that there is absolutely no ground on which the appellant's objection can be founded.

I would dismiss this appeal with costs here and below.

Azmi L.P. concurred.

Appeal dismissed.

Solicitors: *Ng Ek Teong, Zain & Selvarajah; Rajendra & Teik Ee.*

CHUA WEE SENG v. FAZAL MOHAMED

[O.C.J. (Sharma J.) October 16, 1970]

[Malacca — Civil Suit No. 38 of 1966]

Practice and Procedure — Res Judicata — Conditions to be fulfilled.

The plaintiff and the defendant had entered into an agreement on January 17, 1962 whereby the plaintiff agreed to erect eight plank houses for the defendant on the latter's land. The payment was to be by advances and instalments. On August 2, 1962 the plaintiff commenced an action in the sessions court in which he claimed the balance due to him including the instalments due up to the end of July 1962 and judgment was given in his favour. Subsequently the plaintiff brought an action in the High Court claiming payments of the balance of the monthly instalments totalling $5,000. The defendant raised the plea of *res judicata.*

Held: the claim for the balance of $5,000 could not be heard in the sessions court and was never before that court and there was no merit whatsoever in the plea of *res judicata* and therefore judgment must be given for the plaintiff.

Cases referred to:-

(1) *Jenkins* v. *Robertson* (1867) L.R. 1 H.L. 117.

(2) *Duchess of Kingston's Case* (1776) 1 Leach C.C. 146; 168 E.R. 175; 2 Smith's L.C. 13th Edn. 644.

CIVIL SUIT.

T. Thalayasingam for the plaintiff.

S. Shunmugam for the defendant.

Cur. Adv. Vult.

Sharma J.: The plaintiff and the defendant entered into an agreement on the 17th day of January 1962 whereby the plaintiff agreed to erect eight plank houses for the defendant on the latter's land. The defendant agreed to pay the plaintiff $6,150 for the construction of these houses. Payment of the contract price was to be made by the defendant in accordance with clause 8 of the agreement which is reproduced below:

"8. Payment shall be made as follows:—

(a) The 1st payment is paid upon signing of this agreement and the amount is $1,000.

(b) When the beams have been erected an advance of $500 to be paid to the 2nd party.

(c) When roofs are covered then another advance of $650 to be paid to the 2nd party.

(d) After one month of completion another advance of $500 to be paid to the 2nd party.

(e) The balance of $3,500 shall be paid by monthly instalments of $250 by 14 months instalments. The monthly instalments shall be paid from 1st to 15th day of each month. If the instalment is not paid accordingly then the 1st party shall be responsible for the compensation incurred by the 2nd party."

The plaintiff had earlier on 2nd August 1962 commenced an action in the Sessions Court, Malacca, being Civil Action No. 49 of 1962 in which he admitted having received a sum of $2,085 from the defendant. The claim of the plaintiff in that action was for $1,065 and not $4,065 (*i.e.* $6,150 - $2,085) as he could then claim only for the instalments which were due up to the end of July 1962. The defendant had in that action filed a counterclaim against the plaintiff. The following issues were by consent of the parties framed by the learned president:

1. Whether the defendant had paid to the plaintiff the sum of $2,565 and not $2,085 as was alleged by the plaintiff.

2. Whether the plaintiff had not completed the work on or before the 18th March 1962 in accordance with the agreement dated the 17th day of January 1962.

3. Whether the plaintiff had not completed the said work in accordance with the specifications.

After hearing the evidence the learned president seemed to have been satisfied that the defendant had

paid to the plaintiff a sum of $2,565 and he consequently on 7th September 1965 gave judgment for the plaintiff in the sum of $585 and costs and nothing was said or mentioned at all about the defendant's counterclaim or about the other two issues which the parties had agreed to be tried. There was no appeal against that order of the learned president.

Clause 8(e) of the agreement (Exhibit A1) stipulated for payments of fourteen monthly instalments of $250 each. The plaintiff had included in his claim in the sessions court monies which were due to him up to 2nd August 1962. The claim included only two of the fourteen monthly instalments which the defendant had agreed to pay. The present claim of the plaintiff is in respect of the balance of the twelve monthly instalments totalling $3,000. The defendant has now raised the plea of *res judicata* and at the trial of this suit the following preliminary issue was framed: "Is the claim of the plaintiff in the present suit barred by *res judicata*?" Mr. Shunmugam, counsel for the defendant, very rightly at the end of the arguments submitted that if the defendant's plea of *res judicata* failed, there should be judgment for the plaintiff as prayed as there was no other plea sustainable on behalf of the defendant.

The law of *res judicata* was contained in section 6 of the former F.M.S. Civil Procedure Code. It finds no place in our present Rules of the Supreme Court. I do not know why.

In order to render a prior decision conclusive in a subsequent suit it must appear from the record of the former suit that the particular matter sought to be concluded was necessarily determined. "*Res judicata*" said Lord Romilly in *Jenkins* v. *Robertson*,[1]

"by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion *res judicata* signifies that the court has, after argument and consideration, come to a decision on a contested matter."

It must be shown that the matter was heard and finally decided.

In this particular case it cannot be said that the question of the payment of the twelve instalments due from the defendant was ever before the learned president. The parties were never heard on that. The principle of *res judicata* can only apply if there is an identity of issue to be tried and the issue has already been decided on merits in the previous proceedings There can be no *res judicata* regarding a cause of action that has arisen subsequently to the previous suit. The essential requirement for the application of the principle of *res judicata* is that the actual issues in the two suits must be identical. Where the question at issue is not the same in the two proceedings the principle of *res judicata* does not apply. The question at issue in Malacca Sessions Court Civil Action No. 49 of 1962 was whether the defendant had paid to the plaintiff at the time of the institution of that action a sum of $2,565 or $2,085. That issue had nothing to do with the plaintiff's claim in the present suit.

The leading case on the subject is the *Duchess of Kingston's*[2] case and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of *res judicata*:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

The president of the sessions court was not competent to try the present suit and on that ground also the plea of *res judicata* cannot succeed.

To constitute a matter *res judicata* the following conditions must be fulfilled:

1. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
3. The parties as aforesaid must have litigated under the same title in the former suit.
4. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

I am of the view that there is no merit whatsoever in the plea of *res judicata* raised by the defendant. There will thus be judgment for the plaintiff in the sum of $3,000 and costs.

Judgment for the plaintiff.

Solicitors: *T. Thalayasingam & Co.; S. Shunmugam.*

MALACCA MALAY GURU2 CO-OPERATIVE THRIFT & LOAN SOCIETY LTD. v. TAN MEI HUA & ORS.

[O.C.J. (Sharma J.) October 16, 1970]

[Malacca — Civil Suit No. 54 of 1967]

Practice and Procedure — Execution — Writ of seizure and sale — Plaintiffs having no right to issue writ of seizure and sale against defendants — Application to set aside writ of seizure and sale — Inherent right of court to make restitution.

The plaintiffs had obtained judgment against the defendants and it was ordered that the plaintiffs do recover from the first defendant double rent at the rate of $1,000 per month. The third defendants had taken an interpleader